Mediacom

Joseph E. Young,
Senior Vice President, General Counsel & Secretary

November 1, 2011

Ex Parte
By Federal Express
Erin McGrath
Office of Commissioner McDowell
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Oct. 20, 2011 Ex Parte Notice of CBS Corporation—MB Docket 10-71

Dear Ms. McGrath:

In a recent *ex parte* notice, executives of CBS Corporation report a meeting with you on October 18 during which they claimed that "the retransmission consent process is working as Congress intended when it created the system nearly 20 years ago."[1]

In evaluating that assertion, it is important to bear in mind the fact that the current fad in broadcast television is so-called "reality" shows, such as CBS's *Survivor*, in which people are deposited on a deserted island or at another remote locale and where, armed with machetes and a few other basic supplies, they supposedly struggle to survive, even though surrounded by production crews with plenty of food and water, not to mention the ability to call in helicopters to whisk all of them back to civilization. Another example was Fox's series of a few years ago, *Trading Spouses*, in which "moms and dads trade houses and spouses," with the debut episode featuring "a strong willed Blonde who went from driving a truck in Kentucky to throwing elaborate parties in her mansion in Texas" trading places with "a hardworking Surgical Tech from a low-income section of rural Dallas."

As these programs illustrate, for those in the broadcast television business, reality is pretty much what the rest of us think of as fantasy.

This tendency of broadcasters to confuse reality and fantasy is confirmed by their public statements about retransmission consent, most recently the statement reported in the CBS *ex parte* filing. Perhaps our all-time favorite example is the conclusion in a report on retransmission consent prepared for broadcasters by a PhD-for-hire[2] that "while negotiations between programmers and cable operators are . . . hard headed, the results are benefitting consumers."

That is reality according to broadcasters. Here is reality for the rest of us: the price for retransmission consent goes up every time an MVPD negotiates a renewal with one of the big station group owners. Broadcasters make no secret of their intention to drive the price to the levels of the highest-priced cable networks, meaning that if present trends continue, each MVPD subscriber—even senior citizens and others with very little discretionary income—will pay $20 or more per month for broadcast stations. Retransmission consent money usually flows into the coffers of the corporate parent,

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[1] Letter, dated October 20, 2011, from Anne Lucey, Senior Vice President for Regulatory Policy of CBS Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, filed Oct. 20, 2011.

[2] Jeffrey A. Eisenach, Navigant Economics, *Video Programming Costs and Cable TV Prices* (Apr. 2010), attached to a letter from Susan Fox (Disney) to Marlene Dortch (FCC), MB Docket No. 10-71 (Apr. 23, 2010).

rather than to the local stations themselves. The corporate parent uses the money to pay dividends or exorbitant executive salaries, or to support underperforming non-broadcast businesses, instead of investing it to produce more or better locally originated broadcast programming.

At the same time, programming once on broadcast television is shifted to cable networks in which the national broadcast networks have interests—for example, Big Ten collegiate football and basketball games formerly on "free" broadcast television are migrated to the Big Ten Network, which is managed by Fox, in which Fox has an equity interest; the four BCS games, previously aired on broadcast stations, will move to ESPN starting this year; Disney moved Monday Night Football from its ABC broadcast network to its ESPN cable network; and movies that used to appear on broadcast television soon after their theatrical runs now go to pay TV networks. Meanwhile, local and network news and public affairs programs are replaced with infomercials and sitcom reruns or see their staffs and budgets severely cut.

As stations begin to collect real retransmission consent money, the Big Four Networks show up with their hands extended, demanding a share, causing the stations to insist on even higher retransmission consent payments. Increases in retransmission consent fees significantly exceed inflation rates, and consumers pay more every year for the same or lesser programming. When existing retransmission consent deals expire, viewers suffer disruption because broadcasters use threatened or actual loss of signals as a tactic to pressure MVPDs to surrender to their monetary demands. The Big Four Networks make clear their desire, and ultimate intention, to convert the national broadcast networks into cable channels and keep all of the money for themselves, which will probably be the *coup de grace* for the local broadcast television system. In the meantime, the Big Four Networks do not even try to hide their intention to use retransmission consent as a lever to extract even more money from consumers simply because they sometimes want to watch television shows on their notebook computers or iPads rather than their television sets.

For those of us dwelling in the real world and not receiving checks from broadcast interests, it is hard to understand how "the results are benefitting consumers."

The results also are not consistent with congressional intent, contrary to the assertion by CBS in its meeting with you. Carried to its ultimate conclusion, that claim means that Congress intended to create a system in which retransmission consent fees could reach $20 or more per subscriber per month,[3] with all of that money flowing to the corporate parents of the stations to fund dividends, pay huge executive salaries and bail out underperforming non-broadcast business ventures, rather than being reinvested in local stations and local programming, even as more and more popular programming is shifted from broadcast to affiliated pay TV services and the quality and quantity of locally produced news and other programs is reduced. Similarly, if by some confluence of events, 10 million MVPD subscribers simultaneously lost access to local television stations because of negotiating impasses, the broadcasters would say that this was an outcome blessed by Congress.

This perspective should be suspect on its face. The 1992 Cable Act, of course, was motivated largely by complaints about price increases by cable companies and fears that they would deny unaffiliated broadcast and programming services access to their subscribers, and Congress's remedy for the perceived problems was to enact a host of statutory restrictions on the operation of free market forces and to direct the Commission to adopt even more regulatory restrictions.

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[3] The articulated goal of important broadcast interests is for retransmission consent fees for each station affiliated with one of the Big Four networks to reach levels that equal or exceed those of ESPN, which, according to some press reports, charges over $4.00 per subscriber per month. The Big Four networks have started to demand that their local affiliates add up to $1.00 or more for them, meaning that prices of $5.00 or higher per channel are on the radar screens of broadcast interest. That is consistent with the target of $4.50 per subscriber identified by Sinclair's CEO. *See* M. Farrell, *CBS, Sinclair Toss Fuel on Retrans Fire: Station Owners Say They Expect More Cash for Carriage*, Multichannel News, Mar 6, 2006, available at http://www.multichannel.com/article/CA6313013.html. The cost for all of the Big Four stations in a market, therefore, would be at least $20. If there are also stations in the market that are independent or affiliated with networks other than the Big Four, the total cost of broadcast stations could be even higher.

Yet, the broadcasters would have us believe that when it came to retransmission consent, Congress reversed course and put into place a legislative scheme that validates whatever outcome the unregulated market produces, even if the result demonstrably causes the vast majority of ordinary citizens to suffer exactly the same sorts of harms that motivated Congress to act in the first place. This is a peculiar interpretation of the statute and congressional intent. During the floor debate on the legislation that became the 1992 Cable Act, To paraphrase a comment of Senator Bradley during the floor debate on the Senate bill that was the source of the retransmission consent provisions, the broadcasters' interpretation "turn[s] the purpose of this bill on its head."[4]

Given that the fundamental reason Congress created retransmission consent was its belief that there is a strong public interest in ensuring that Americans—including those who rely on cable—continue to have ready access to broadcast television,[5] it is ludicrous to argue that it then created a system in which continued access by cable subscribers becomes solely a matter of private negotiations between two entities viewed in 1992 as monopolies (a cable company with little or no competition at the time and a broadcast station armed with network and syndicated program exclusivity), with no one representing the public during the negotiations or with the power to intervene if the negotiations broke down and resulted in a shut off.[6]

Moreover, the legislative history is replete with statements by key Senators and Representatives that unambiguously and irrefutably establish that Congress did not expect or want the retransmission consent process to produce increases in subscribers' bills or blackouts.

During floor debate on the legislation that ultimately was enacted as the 1992 Cable Act, a number of Senators stated their concern that retransmission consent might result in increases in subscriber rates. Supporters of the legislation argued that significant rate increases would not occur, in part because of a misplaced trust in broadcasters to act reasonably and in part based on assumptions that have not proven true, such as that negotiations would be conducted by local stations, not corporate parents, and that market conditions that in roughly equivalent bargaining power or an advantage for large MSOs would continue to exist. It was predicted that most broadcasters would elect must-carry, and that many or most of the broadcasters who did elect retransmission consent would settle for in-kind consideration such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. Senator Bradley, for example, expressed his view that "most broadcasters will opt for must-carry while a significant number of other broadcasters will negotiate nonmonetary terms, such as channel position, for the use of their signal. . . . Thus, the vast majority of cable operators will, in my opinion, not incur significant increases in cost due to the retransmission consent provision."[7] Legislators made it clear that if, contrary to these expectations, retransmission consent resulted in significant cost increases, that would be contrary to Congressional intent.[8]

It is equally clear that Congress did not intend for cable subscribers to lose access to local broadcast station programs because of negotiating deadlocks. For example, Senator Inouye, a sponsor of the Senate bill that was the basis for the 1992 Cable Act and the author of the retransmission consent provision, said this:

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[4] *See* 138 Cong. Rec. S14602 (Sept. 22, 1992) (statement of Sen. Bradley) (a "rate increase resulting from these [retransmission consent and buy-through] provisions would turn the purpose of this bill on its head").

[5] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, §§ 2(b)(9), 2(b)(15), 2(b)(17) & 2(b)(18).

[6] *See* Richard A. Gershon & Bradley R. Eagan, *Retransmission Consent, Cable Franchising, and Market Failure: a Case Study Analysis of Wood-TV 8 Versus Cablevision of Michigan,* Journal of Media Economics 201, 214 (1999). (Examining the 1996 retransmission consent dispute between WOOD-TV in Kalamazoo, Michigan and Cablevision Systems Corporation, and concluding that although "the broadcast spectrum can be considered a public resource," because of the FCC's refusal to intervene even after a negotiating deadlock causes a carriage disruption, "the public was powerless to effect change while the two parties worked out a dispute that substantially involved public property.").

[7] 138 Cong. Rec. S14603 (Sept. 22, 1992) (Statement of Sen. Bradley).

[8] *See, e.g., id.* at S14602 (Sept. 22, 1992) (statement of Sen. Bradley).

> I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.[9]

Other statements in the legislative history confirm that Congress intended the Commission to ensure that retransmission consent demands did not drive up prices or cause blackouts. For example, Senator Wellstone cited assurances given by the Senate Commerce Committee's legal counsel "that existing law provides the FCC with both the direction and authority to ensure that the retransmission consent provision will not result in a loss of local TV service."[10] Senator Sanford clearly expressed the expectation that the Commission would act to prevent retransmission consent from driving up subscriber rates, favorably quoting the statement by Senator Hollings, the Chairman of the Senate Commerce Committee, in a letter to the *New York Times* that "it would be a direct violation of the statute for the FCC to permit retransmission consent to result in large rate hikes."[11]

In sum, Congress saw retransmission consent as a benign way for broadcasters to improve their competitive position *vis-à-vis* independently owned cable networks, without, however, driving up the cost of cable service or disrupting consumers' access to programming. Today, the competitive and regulatory balance that Congress expected to keep retransmission consent demands in check has tilted decidedly in favor of the broadcasters, who do not hesitate to threaten to pull the plug on MVPD subscribers in order to force capitulation to their demands for retransmission consent fees that significantly exceed inflation. Congress foresaw the possibility that the system might not work as intended, and, in that event, expected the Commission to intervene.

For all of these reasons, CBS's claim that the retransmission consent process is working as Congress intended simply is unsustainable.

In conclusion, we think it is clear that the retransmission consent system is malfunctioning, resulting in real and significant negative consequences for consumers that are not offset by any possible gains. The case is overwhelming that the retransmission consent requirement is not just failing to further the public policy goals that led to its creation, but is actually producing results that are contrary to the congressional purpose. Just as compelling is the case that Congress expected the Commission to intervene to protect consumers if, as is happening, retransmission consent did not work as intended. We respectfully ask the Commission to reject the urgings of broadcasters that it continue to sit on the sidelines as actual and threatened shutoffs are used to coerce to double or triple digit increases in retransmission consent fees.

Very truly yours,

Joseph E. Young

cc: Marlene H. Dortch (by electronic filing in MB Docket 10-71)

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[9] *Id.* at S643 (Jan. 30, 1992).

[10] *Id.* at S14604 (Sept. 22, 1992). *See also id.* at S.14224 (Sept. 21, 1992) (Statement of Sen. Inouye); *id.* at S14248 (Sept. 21, 1992) (Statement of Sen. Gorton); *id.* at S14615 (Sept. 22, 1992) (Statement of Sen. Lautenberg).

[11] *Id.* at S14603-14604 (Sept. 22, 1992) (remarks of Sen. Sanford). *See also id.* at. S14222 (Sept. 21, 1992) (remarks of Sen. Inouye).